Supreme Court, U.S.
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No. 95-783

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE STATE OF OKLAHOMA,
Petitioner,

v.

BARBARA LYNN BELL,
Respondent.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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November, 1995
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QUESTIONS PRESENTED

1. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the defendant was "presumed to be not guilty" so impermissibly lessened the burden of proof upon the state that it denied the defendant his constitutional right to a fair trial as articulated in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

2. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the defendant was "presumed to be not guilty" is an error constituting a substantial violation of constitutional right that may never be considered harmless.

3. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the state had the burden of proving all the material allegations of the information beyond a reasonable doubt before the jury could find the defendant guilty violated the Due Process Clause pursuant to *Sullivan v. Louisiana*, 508 U.S. ____, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

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No. _____,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

v.

BARBARA LYNN BELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Oklahoma, by and through W.A. Drew Edmondson, Attorney General of the State of Oklahoma, respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Court of Criminal Appeals for the State of Oklahoma.

OPINION BELOW

The Court of Criminal Appeals for the State of Oklahoma issued it accelerated docket order in *Bell v. State*, Court of Criminal Appeals Case No. F-93-1286. The order was issued August 22, 1995. A petition for rehearing was

not filed. This petition for writ of certiorari is due to be filed on November 20, 1995.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATEMENT OF CASE

The defendant, Barbara Lynn Bell, was convicted of the crime of Murder in the Second Degree in Tulsa County, Oklahoma, in Case No. CF-93-479, and received a sentence twenty (20) years imprisonment.

The defendant raised two propositions of error on appeal. The grounds related to the instructions of the trial court that the defendant was presumed to be not guilty and that the prosecution had the burden to prove the material allegations of the information beyond a reasonable doubt before the jury could convict the defendant.

The Oklahoma Court of Criminal Appeals reversed the conviction pursuant to its decision in *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995), *reh'g denied*, 899 P.2d 1162 (1995). A Petition for Writ of Certiorari challenging that decision is pending in *State v. Flores*, United States Supreme Court No. 95-493.

SUMMARY OF THE ARGUMENT

The issues in this case are identical to those raised in *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995) *reh'g denied*, 899 P.2d 1162. In *Flores*, the Oklahoma Court of Criminal Appeals misapplied *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), and *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978), so as to find that an instruction advising the jury that a defendant is presumed to be not guilty is a misstatement of law diluting the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. The Court of Criminal Appeals also erred in finding that the instruction is an error of such magnitude that it can never be held to be harmless.

Furthermore, the Court of Criminal Appeals in *Flores, supra,* misapplied this Court's opinion in *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), in concluding that an instruction advising the jury that the prosecution had the burden of proving the material allegations of the information--rather than the elements of the offense--beyond a reasonable doubt was a violation of the Due Process Clause.

REASONS FOR GRANTING WRIT

I.

THE OKLAHOMA COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THAT THE DEFENDANT WAS "PRESUMED TO BE NOT GUILTY" SO IMPERMISSIBLY LESSENED THE BURDEN OF PROOF UPON THE STATE THAT IT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AS ARTICULATED IN *ESTELLE V. WILLIAMS*, 425 U.S. 501, 96 S. CT. 1691, 48 L. ED. 2D 126 (1976).

At the defendant's trial, the trial court gave an instruction stating that the defendant was presumed to be not guilty of the crime charged against her in the information until her guilt was established beyond a reasonable doubt; the instruction also stated that the presumption continued with her unless every material allegation of the information was proven by evidence beyond a reasonable doubt.

This instruction deviated from the Oklahoma Uniform Jury Instructions--Oklahoma, which is prescribed by Okla. Stat. tit. 12, § 557.2 (1991). However, a violation of § 557.2 is not automatically reversible under Oklahoma state law. *Fontenot v. State*, 881 P. 2d 69, 84 (Okla. Crim. App. 1994). Whether the error in the instruction required reversal

required the Court of Criminal Appeals to determine whether the error violated a substantial constitutional or statutory right. Okla. Stat. tit. 20, § 3001.1 (1991). If the error in an instruction violated a constitutional right, the court may still consider whether it is harmless under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The Court of Criminal Appeals based its decision reversing the defendant's conviction solely on *Flores, supra*. Although *Flores* recognized that an instruction on the presumption of innocence is not constitutionally required in all cases but was required by state statute, Okla. Stat. tit. 22, § 836 (1991), the court relied on federal constitutional law to demonstrate that the instruction on the presumption to be not guilty required reversal to prevent a "dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Flores*, 896 P. 2d at 562, citing *Estelle v. Williams*, 425 U.S. at 503, 96 S. Ct. at 1692-93.

The Court of Criminal Appeals misinterpreted this Court's statement of purpose of the presumption of innocence. The court stated that the presumption was a command to the jury "to start their deliberations from the premise there exists an absence of guilt." *Flores*, 896 P. 2d at 562. The court distinguished the presumption of being not guilty as a different command to the jury: to begin its deliberations from the premise there is an absence of sufficient proof of guilt. *Id.* However, this Court has identified the presumption of innocence instruction as a prophylactic for ensuring that the accused is judged solely on

the basis of the evidence adduced at trial. *Taylor v. Kentucky* 436 U.S. 478, 486, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). The advantage of an instruction on the presumption of innocence--beyond just a restatement that the burden is on the prosecution to prove its case beyond a reasonable doubt--is that it:

> conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider in the material for their belief, *nothing but the evidence, i.e.,* no surmises based on the present situation of the accused.

Taylor, 436 U.S. at 485, quoting 9 J. Wigmore, Evidence § 2511, p. 407 (3d ed 1940) [Emphasis in original].

An instruction that the accused is presumed innocent and an instruction that she is presumed not guilty are indistinguishable in the function of emphasizing to the jury that the burden is upon the state to prove the elements of the charge beyond a reasonable doubt. Clearly, use of "presumed innocent" as a talismanic phrase is not necessary to fulfill the constitutional functions of the instruction. In *Taylor*, this Court quoted with approval from Professor Wigmore:

> It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charged is presumed to be not guilty is to say in another form that the proponent of the claim or charge must evidence it. Wigmore 407.

436 U.S. at 483, n. 12. Perhaps Professor Wigmore's use of both phrases interchangeably led this Court to emphasize that the phrase "'presumption of innocence'-- or any other form of words" may not be constitutionally mandated so long as the principle that guilt be established by probative evidence and beyond a reasonable doubt is not diluted. 436 U.S. at 485-86.

Other instructions given by the trial court stated that the burden was on the state to prove by evidence all the material allegations in the information and that the failure of the state to meet its burden required the jury to acquit (O.R. 175); in addition, the court instructed that the state had the burden of proving each element beyond a reasonable doubt for the offenses of murder in the first degree (O.R. 176), murder in the second degree (O.R. 182), and manslaughter in the first degree (O.R. 186). When taken as a whole, the jury could only have concluded that the burden was on the state to prove by evidence each element of the offense beyond a reasonable doubt.

The instruction on the presumption of being not guilty satisfied *Taylor*, as modified by *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), a conclusion shared by the Ohio Court of Appeals in *City of Bucyrus v. Fawley*, 50 Ohio App. 3d 25, 552 N.E.2d 676, 677 (Ohio App. 1988).

The Court of Criminal Appeals found in *Flores,* 896 P.2d at 562, that use of an instruction that the defendant was presumed not guilty so undermined the presumption of innocence as to effectively deny the defendant's constitutional and statutory rights; the rights identified by the court were his constitutional right to have his guilt established by probative evidence and beyond a reasonable

doubt. The instruction on a presumption of being not guilty did not dilute this right and this Court should grant certiorari to correct the error in the manner the Court of Criminal Appeals interpreted *Estelle v. Williams*, and *Taylor*.

II.

THE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THE DEFENDANT WAS "PRESUMED TO BE NOT GUILTY" IS AN ERROR CONSTITUTING A SUBSTANTIAL CONSTITUTIONAL RIGHT THAT MAY NEVER BE HARMLESS.

In *Flores*, the sole basis for the reversal of the defendant's conviction in the instant case, the Court of Criminal Appeals identified the defendant's right to an instruction on the presumption of innocence as statutory but then identified the interests serviced by the instruction by reference exclusively to United States constitutional law; the court found the instruction that the defendant was presumed not guilty amounted "to an **impermissible** lessening of the burden of proof." *Flores v. State*, 896 P.2d 558, 562 (Okla. Crim. App. 1995) [Emphasis added]. While the opinion's next sentence suggests that the error might upon occasion be considered harmless in light of the instructions when taken as a whole ("Such error was not cured by any other instructions specifically, an appropriate burden of proof instruction." *Id.*), it is clear that the court concluded that the error in use of an instruction of the presumption of being not guilty is not subject to harmless error analysis on a case-by-case basis under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

This conclusion is supported by the opinions concurring in and dissenting to the Order Denying Rehearing, *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995). Judge Chapel concluded that the instructional error cannot be dismissed as harmless lest it "undermine two crucial tenets of our democratic society: that a criminal conviction must be support by trial evidence which establishes guilt beyond a reasonable doubt; and that out government is one of laws and not of men." *Id.* at 1167. Judge Strubhar wrote that she "agonized over the decision to find such an error may never be harmless." *Id.* at 1168. The dissenting opinion of Presiding Judge Johnson confessed that he had misinterpreted the language in *Flores* relative to harmless error analysis; he would have found the error of a presumed not guilty instruction subject to harmless error analysis but that it was not harmless in Flores' case. *Id.* at 1169-70. Judge Lumpkin's dissent discusses extensively the harmless-error doctrine in reference to presumed not guilty instructions. *Id.* at 1170-1177. Finally, this conclusion is further supported by the dissenting opinion of Judge Lumpkin attached to the Accelerated Docket Order being challenged in this petition.

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), this Court stated that most constitutional errors can be harmless and supplied a list of examples. Many of these errors identified as subject to harmless error analysis on a case-by-case basis arguably involved a lessening of the burden upon the prosecution: *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504, 107 S. Ct. 1918, 95 L.Ed. 2d 439 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92

L. Ed. 2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption). These were identified as "trial errors" in contrast to "structural errors" which can never be subject to harmless error analysis. *Fulminante*, 499 U.S. at 307-09.

The error in a presumed not guilty instruction identified by the Court of Criminal Appeals is that it undermined the presumption of innocence as to effectively deny the constitutional and statutory protections the presumption affords, i.e., that jurors "put away from their mines all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." *Flores*, 896 P.2d at 562, quoting *Taylor v. Kentucky*, 436 U.S. at 485. If this is error, it is a trial error and subject to harmless error analysis.

As Chief Justice Rehnquist stated in his concurring opinion in *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), "there is a 'strong presumption' that any error will fall into the first of these categories. Thus it is the rare case in which a constitutional violation will not be subject to harmless error analysis." *Id.* 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d at 191.

The Court of Criminal Appeals essentially found in *Flores* that the instruction on the presumption of not guilty violated the defendant's right to a fair trial and her right that guilt be established by probative evidence beyond a reasonable doubt as articulated in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). These violations are trial error and not structural error. The decision that this instructional error can never be harmless conflicts with clear statements of the law by this Court.

Certiorari should be granted to correct this error and to allow the Court of Criminal Appeals to apply the harmless error standard to the presumed not guilty instruction.

III.

THE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THAT THE STATE HAD THE BURDEN OF PROVING ALL THE MATERIAL ALLEGATIONS OF THE INFORMATION BEYOND A REASONABLE DOUBT BEFORE THE JURY COULD FIND THE DEFENDANT GUILTY VIOLATED THE DUE PROCESS CLAUSE PURSUANT TO *SULLIVAN V. LOUISIANA*, 508 U.S. ___, 113 S. CT. 2078, 124 L. ED. 2D 182 (1993).

The Court of Criminal Appeals stated in *Flores*, it was less troubled by the trial court's instruction that the state had the burden of proving the material allegations of the information than by the instruction that the defendant was presumed not guilty. *Id.* 896 P.2d at 563. However, just as the court elevated "presumed innocent" to a talisman, the court has essentially mandated the use of the phrase "elements of the offense." Therefore, despite other instructions defining the elements of the offenses and proscribing a conviction in the event the state failed to prove each element by proof beyond a reasonable doubt (O.R. 175*f*, 186), the court found the "material allegations" instruction violated due process according to *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 2080, 124 L. Ed. 2d 182 (1993).

All the essential elements of an offense are to be alleged in an information. *Miller v. State*, 827 P.2d 875, 877 (Okla. Crim. App. 1992). The defendant in this case has not challenged the information for failing to allege the essential elements of murder in the first degree. The use of the phrase "material allegations of the information" in this case did not negate the elements of the offense; if anything, the instruction increased the burden of proof upon state in proving murder in the first degree. The instructions as a whole clearly stated the burden was upon the state to prove each element of the offense beyond a reasonable doubt.

The Court of Criminal Appeals erred in holding in effect that *Sullivan v. Louisiana*, supra, mandated use of the phrase "elements of the offense." The issue in that case was whether a constitutionally deficient definition of reasonable doubt is subject to harmless error analysis. In the instant case, however, there was no definition--deficient or otherwise--of reasonable doubt at issue. However, where as here, the instructions when taken as a whole clearly place the burden of proof upon the state to prove all the elements of the offense charged beyond a reasonable doubt before the jury may find the defendant guilty, then use of the phrase "material allegations" did not violate due process.

This Court should grant certiorari to review and correct the erroneous conclusion of the Court of Criminal Appeals that use of the phrase "material allegations" violated due process.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to review the decision of the Oklahoma Court of

Criminal Appeal. The decision is contrary to the law of this Court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BARBARA LYNN BELL,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. F-93-1286**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ACCELERATED DOCKET ORDER

On January 28, 1993, the Appellant was charged with First Degree Murder in the District Court of Tulsa County, Case No. CF-93-0479. A jury found Appellant guilty of Second Degree Murder and recommended a sentence of twenty (20) years imprisonment. The Honorable Clifford Hopper sentenced Appellant according to the jury's recommendation. From this Judgment and Sentence, Appellant has perfected this appeal.

Appellant made application for this appeal to be placed on the Accelerated Docket pursuant to 22 O.S.Supp.1994, Ch.18, App., Rules of the Court of Criminal Appeals, Rule 11.3. No objection was made by Appellee. The propositions or issues were presented to this Court in oral argument August 17, 1995, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court.

Appellant raised two propositions of error on appeal:

I. The trial court committed reversible error by giving a modified version of OUJI-CR-903; and

II. The trial court committed reversible error by giving a modified version of OUJI-CR-109.

IT IS THEREFORE THE ORDER OF THIS COURT, by a three (3) to one (1) vote, after hearing oral argument and after a thorough consideration of Appellant's propositions of error and the entire record before us on appeal, the Judgment and Sentence of the Trial Court is **REVERSED** and **REMANDED** for a new trial pursuant to Flores v. State, 896 P.2d 558 (Okl.Cr.1995), reh'g denied, __ P.2d ___, 66 O.B.J. 2161 (Okl.Cr.1995).

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of August, 1995.

CHARLES S. CHAPEL, Vice Presiding Judge, Specially Concurring

GARY L. LUMPKIN, Judge
Dissenting

JAMES F. LANE, Judge

RETA M. STRUBHAR, Judge

CHAPEL, V.P.J., SPECIALLY CONCURRING:

I do not particularly mind Judge Lumpkin continuing to beat a dead horse as he has persisted in doing with his inane separate writings to the Flores cases. However, I must object when he asserts "the majority is not being candid regarding the legal basis for the decision."

In point of fact the majority has been very precise and, indeed, absolutely clear in its opinions on this issue. Judge Lumpkin's problem is that he, like too many judges, at some point begin believing that their own dicta is the law. Some time ago Judge Lumpkin authored an opinion in ***Simpson v. State.***[1] In that opinion he had a revelation on the harmless error doctrine. Since his revelation, he has preached the doctrine in almost every case. Indeed, if one listens to Judge Lumpkin there is virtually no error that cannot be found to be harmless.

In ***Simpson*** and in his dissent to this Order (and in most all of his separate writings dealing with ***Flores*** issues) Judge Lumpkin simply misinterprets his own revelation. I will concede that Judge Lumpkin has a fairly good grasp of the harmless error doctrine under Federal law. The problem is, however, his knowledge is of very little use because the harmless error doctrine in Oklahoma is set forth at 21 O.S.1991, § 3001.1.

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[1]876 P.2d 690 (Okl.Cr.1994). Judge Lumpkin did not understand the issues in ***Simpson*** any more than he understands them now. I tried in a dissent to ***Simpson*** point out the error of his ways. But, alas, it was for naught.

In ***Flores***, we applied the Oklahoma statutory harmless error rule and we determined the error was not harmless. In the words of the statute, we found the error to be a "substantial violation of a constitutional or statutory right." Judge Lumpkin can continue to write that the Court did not apply harmless error analysis in ***Flores*** until the cows come home. His writings will not, however, change the law or the facts.

LUMPKIN, JUDGE: DISSENTING

I dissent, based on my dissent in **Flores v. State**, ___ P.2d ___, 66 OBJ 367, **reh'g denied**, ___ P.2d ___, 66 OBJ 2161 (Okl.Cr.1995); ___ P.2d ___, 66 OBJ 2161, 2167 (Lumpkin, J., dissenting on petition denying rehearing).

The comments made during the oral argument in this case expose the fallacy of the majority's reasoning. Based on those statements it is evident the majority of the Court seems to believe a harmless error analysis was conducted in **Flores**. This is incorrect, under any definition of the term I know.

This is best shown by language in **Sullivan v. Louisiana**, 508 U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), an opinion analyzing an error in defining "beyond a reasonable doubt." There, the question before the Court was not whether the error was harmless beyond a reasonable doubt; the question was whether a harmless error analysis could even be conducted **at all**. **See Id.**, 508 U.S. at ___, 113 S.Ct. at 2081,[1] 2082,[2] 2083.[3] The Court determined the error

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[1] "Although most constitutional errors have been held amenable to harmless-error analysis, see Arizona v. Fulminante, 499 U.S. ----, ----, 111 S.Ct. 1246, 1252, 113 L.Ed.2d 302 (1991) (opinion of REHNQUIST, C.J., for the Court) (collecting examples), some will always invalidate the conviction. Id., at ----, 111 S.Ct. at 1254 [giving examples]. The question in the present case is to which category the present error belongs."

[2] "Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review in the present case becomes evident." . . . "Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: . . ."

was structural, not subject to harmless error analysis. **See also Bartell v. State**, 881 P.2d 92 (Okl.Cr.1994).

The same is true here. In **Flores**, it appears a majority of this Court conducted an analysis of the error to determine not whether it was harmless in that particular case, but whether it could be harmless at all. The difference is subtle, but important. One is harmless error analysis; the other is an analysis to determine whether the error can be determined harmless, or whether it is structural, and therefore can never be harmless. Clearly, the majority determined the error in **Flores** -- and here as well -- is structural. To say a harmless error analysis was conducted is not supported by the law or facts and the majority is not being candid regarding the legal basis for the decision.

This procedural posture of this case dramatically illustrates this point. Because this was not a case automatically assigned to the accelerated docket, Appellant was limited to three propositions of error. **See** 22 O.S.Supp.1994, Ch. 18, App. **Rules of the Court of Criminal Appeals**, Rule 11.3(D). Despite this, Appellant raised only two propositions of error: the two erroneous instructions discussed and found faulty in **Flores**. Because Appellant has alleged only error in the **Flores** instructions and no other, this Court has no other error before it. In fact, the Appellant filed a waiver of all other allegations of error in accordance with Rule 11.3 and Form 13.13. Pursuant to the

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[3]"The deprivation of [the right to a jury trial, the essential consequence of an erroneous instruction defining 'beyond a reasonable doubt'], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"

Rules of the Court of Criminal Appeals "[r]eview of other alleged propositions or issues of error from the same trial record [not raised in the accelerated docket application] will be foreclosed." **Id.** Consequently, under any harmless error analysis this Court could make based on the issues properly raised and subject to review, the error must be held harmless -- if such an analysis were possible.

This Court, in reversing this case, reveals the flaws in its own reasoning and acknowledges its true holding in **Flores** that the giving of a "presumed not guilty" instruction is a structural error not subject to harmless error analysis. Accordingly, I dissent.

(2)

Supreme Court, U.S.
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In The

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October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

v.

BARBARA LYNN BELL,

Respondent.

On Petition For Writ Of Certiorari To The Oklahoma Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant the petition for writ of certiorari where, less than two months ago, this Court denied a petition filed by the same petitioner in another case raising "identical" issues, and the petitioner has not identified any new facts or reasons which might warrant this Court's reconsideration.

2. Whether this Court should grant the petition for writ of certiorari where the State has not cited any valid basis for this Court's jurisdiction and has not demonstrated the existence of any federal issue under 28 U.S.C. §§ 1254, 1257.

3. Whether the petitioner has demonstrated a basis for this Court's review where the subject state court decision, holding that the trial court committed reversible error by intentionally mis-instructing a jury in violation of State statutes, is expressly premised upon adequate and independent state law grounds.

4. Whether this Court should review the State court decision on the basis of due process where the State court did not decide any due process issue.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Barbara Lynn Bell, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, the State of Oklahoma.

OPINIONS BELOW

On August 22, 1995, the Oklahoma Court of Criminal Appeals reversed the judgment and sentence of the respondent and remanded the case to the trial court for a new trial "pursuant to *Flores v. State*, 896 P.2d 558 (Okl. Cr. 1995)."[1] As noted, the court's decision was wholly based upon its prior opinion in *Flores v. State*, 896 P.2d 558, *reh'g denied*, 899 P.2d 1162 (Okla. Crim. App.). (Petition App., p. 2a). This Court denied the State's petition for writ of certiorari in *Flores* on November 27, 1995. *Oklahoma v. Flores*, ___ U.S. ___, 116 S.Ct. 548 (1995).

JURISDICTION

Petitioner cites 28 U.S.C. § 1254 as the applicable section describing the basis for this Court's jurisdiction. Section 1254 does not apply to cases in which review of a decision of the highest court of a State is sought. The petitioner has not stated any valid basis for this Court's

[1] The decision of the Oklahoma Court of Criminal Appeals is reprinted at pages 1a through 7a of the Appendix ("App.") to the Petition.

exercise of jurisdiction. *See* Rule 14.1(e) of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED[2]

28 U.S.C. § 1254.

28 U.S.C. § 1257.

Okla. Stat. tit. 12, § 577.2.

Okla. Stat. tit. 20, § 3001.1.

Okla. Stat. tit. 22, § 836.

Oklahoma Uniform Jury Instruction – Criminal, No. 109

Oklahoma Uniform Jury Instruction – Criminal, No. 903

STATEMENT OF THE CASE

On January 28, 1993, the respondent, Barbara Lynn Bell, was charged with first degree murder in the District Court of Tulsa County (Case No. CF-93-0479), Tulsa, Oklahoma. Following a jury trial, she was convicted of second degree murder and sentenced to twenty years imprisonment.

At the respondent's trial, the trial judge, the Honorable Clifford E. Hopper, intentionally administered jury instructions which substantively departed from uniform

[2] The full texts of the statutes involved are included in App. A to this Brief in Opposition.

instructions required to be given under Oklahoma law. The judge erroneously instructed the jury that the respondent was presumed to be "not guilty" and also instructed that the burden of proof in the case "is upon the State to establish by evidence, beyond a reasonable doubt, all the material allegations contained in the Information."

On January 24, 1995, the Oklahoma Court of Criminal Appeals rendered its opinion in *Flores, supra,* 896 P.2d 558. There, the court reversed the conviction of Jose Flores for the identical erroneous instructions which were administered at the respondent's trial. On June 27, 1995, the Oklahoma Court of Criminal Appeals denied the State's petition for rehearing in *Flores. See* 899 P.2d 1162.

The respondent raised two propositions of error on her direct appeal, each of which was premised on the trial judge's administration of the flawed instructions discussed by the court in, and dispositive of, *Flores.* By "Accelerated Docket Order", the Oklahoma Court of Criminal Appeals reversed the judgment and sentence rendered in the trial court and remanded for a new trial, basing its decision entirely on its prior opinion in *Flores.*

The State filed a petition for writ of certiorari in *Flores* on September 25, 1995. On November 20, 1995, while the *Flores* petition was pending, the State filed its petition for writ of certiorari in this case. This Court *denied* the petition in *Flores* on November 27, 1995. *Oklahoma v. Flores,* ___ U.S. ___, 116 S.Ct. 548 (1995). After the denial of the State's petition for writ of certiorari in *Flores,* and in view of the State's admission that "[t]he issues in this case are identical to those raised in *Flores,*"

(Petition, p. 3), the respondent asked that the State dismiss its petition, pursuant to Supreme Court Rules 46.1 and 46.2.(a). The State declined that request, claiming that the decision in *Bell* clarifies the majority and minority positions of the Oklahoma Court of Criminal Appeals.[3]

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[3] There is nothing in the petition which identifies for the Court (or the respondent) any substantive differences between the *Flores* and *Bell* opinions. In fact, there are none, and the State's decision to literally copy the *Flores* petition, with only minor cosmetic alterations, is indicative of that fact.

The "identical" elements of the *Flores* and *Bell* petitions are not limited to the issues raised. With the exception of changing "he" or "him" to "she" or "her", entire pages of the *Bell* petition are identical to the *Flores* petition. On other occasions, even the gender of the respondent is not corrected, and a number of typographical errors found in the *Flores* petition are repeated in the *Bell* petition. For example, in both petitions, the State quotes the majority opinion in *Flores* stating "out government is one of laws and not of men," as opposed to "our government is one of laws and not of men." (*Flores* petition, p. 9; *Bell* petition, p. 9). Similarly, each petition misquotes the *Flores* court's reference to *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 1934 (1978), stating that a presumption of innocence cautions jurors to "put away from their **mines** all the suspicion that arises from the arrest, the indictment, and the arraignment." (*Flores* petition, p. 10; *Bell* petition, p. 10). The jurors are instead cautioned to put these suspicions out of their **minds**. Even the first alleged reason for granting the writ (Petition, p. 4) states that the Oklahoma Court of Criminal Appeals erred in its conclusion that the respondent was denied "**his** Constitutional Right To A Fair Trial." This "reason" is taken directly from the *Flores* petition. (*Flores* petition, p. 4).

SUMMARY OF THE ARGUMENT

The petitioner has not identified a valid basis upon which this Court may exercise jurisdiction. There is none. The Oklahoma Court of Criminal Appeals did not decide a question of federal law, but instead expressly based its opinion on Oklahoma law. The error in this case involves a trial judge's advertent mis-instruction of a jury, in direct violation of state law; issues which are clearly within the authority of the Oklahoma Court of Criminal Appeals. The petitioner's claim that the lower court's decision is based upon the Due Process Clause is not supported by the record and cannot serve as the basis for this Court's review of the decision of the Oklahoma Court of Criminal Appeals, as that court's reversal was not based on any due process violation.

REASONS FOR DENYING THE WRIT

I. THIS COURT RECENTLY DENIED CERTIORARI IN *FLORES*, THE CASE UPON WHICH THE REVERSAL OF RESPONDENT'S CONVICTION IS BASED, AND THE PETITIONER HAS NOT IDENTIFIED ANY JUSTIFICATION FOR A DIFFERENT RESULT HERE. THERE IS NONE.

On November 27, 1995, this Court denied certiorari in *Oklahoma v. Flores*. In its petition for certiorari in the instant case, the State of Oklahoma acknowledges that "[t]he issues in this case are identical to those raised in *Flores v. State*." (Petition, p. 3). The petitioner further concedes that the *Flores* decision is "the sole basis for the

reversal of the [respondent's] conviction in the instant case." (*Id.*, p. 8).

The petition in this case does not set forth any rationale for this Court to treat the present case differently than *Flores*. In fact, the State has conceded that the issue in this case is controlled by *Flores*. In a letter attached to a pleading filed in this case on September 1, 1995 in the Oklahoma Court of Criminal Appeals, the State made the following statements:

> We intend to ask the Court of Criminal Appeals to stay issuance of the mandate while we seek United States Supreme Court review of the controlling issue in this [case] presented in *Flores v. State*.
>
> We are taking this step to insure the Court of Criminal Appeals will have the jurisdiction to apply a favorable ruling in the *Flores* case to Defendant Bell's case.

By proceeding in such a fashion, the petitioner is inviting the Court to treat this case as it did *Flores* – by denying certiorari. The petitioner has not differentiated the Oklahoma Court of Criminal Appeals' order in the present case from the *Flores* opinion, and has failed to articulate any valid basis for the Court to grant certiorari in this case.

The State's decision to proceed with this petition despite the Court's denial of certiorari in *Flores* is perhaps explained by proceedings collateral to the direct appeal.[4]

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[4] The respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of

Apparently, the State is interested in pursuing any means of attacking the Oklahoma Court of Criminal Appeals' decision which might allow it to avoid the referenced troublesome and extraordinary actions of certain of the State's employees. In this regard, it is noteworthy that the State knew of the various jurisdictional defects in the *Flores* petition, which had been called to the State's attention by the respondent in *Flores*, yet the State has elected to file a similarly defective pleading in the instant case, and it has made no effort to correct or explain these defects.

Oklahoma on February 22, 1995. *See Barbara Lynn Bell v. Neville Massie, et al.*, Case No. 95-C-169B. A remedy sought in the habeas proceeding is a bar to any re-prosecution of the respondent – a form of habeas relief recognized in the Tenth Circuit. *See Capps v. Sullivan*, 13 F.3d 350, 353 (10th Cir. 1993); *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1879 (1993). The events which warrant such relief include the concerted conduct of a number of employees of the State of Oklahoma, including the trial judge's court reporter, the Tulsa County District Court Administrator, and, possibly, the trial judge himself, in concealing or destroying the backup audiotapes utilized as an aid to the court reporter in the course of the respondent's trial.

Discovery is ongoing in the habeas matter as to the referenced events. Thus far, that discovery has been marked by (i) sworn testimony indicating the existence of a conspiracy to deprive the respondent of the means to fully and adequately prosecute an appeal and protect her interests and (ii) the exercise of the Fifth Amendment privilege against self-incrimination by the trial judge's court reporter.

II. THE STATE HAS NOT PROPERLY INVOKED THE COURT'S JURISDICTION. THE OPINION OF THE COURT OF CRIMINAL APPEALS IS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The Rules of this Court require the petitioner to cite the statutory provision conferring jurisdiction on this Court. *See* Supreme Court Rule 14.1(e)(iv). The petitioner cites 28 U.S.C. § 1254 as the appropriate jurisdictional statute. However, § 1254 only invokes the Court's jurisdiction over writs of certiorari and certified questions arising from the federal courts of appeals. The present case arises out of the Oklahoma Court of Criminal Appeals, and § 1254 cannot serve as a basis for this Court to exercise jurisdiction.

Furthermore, the petitioner has failed to demonstrate that 28 U.S.C. § 1257, the statute governing jurisdiction over judgments rendered by the highest court of a State, confers jurisdiction on the Court. Section 1257 only confers jurisdiction on the Court to review final decisions of a state court where (i) the validity of a federal statute is drawn into question, (ii) the validity of a state statute is drawn into question on the ground that it is repugnant to federal law, or (iii) a right is claimed under federal law.[5]

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[5] In relation to the jurisdictional question, Rule 10 of the Rules of this Court sets forth examples of "compelling reasons" upon which the Court may grant a petition for writ of certiorari. These reasons include: conflicts of state courts on *federal* questions; situations in which a state court has decided an important question of *federal* law which has not been, but should be, decided by the Court; and situations in which a state court has decided a *federal* question in a way that conflicts with decisions

None of these bases for the exercise of this Court's jurisdiction exist.

In this case, the Oklahoma Court of Criminal Appeals based its decision on *state law*. At the respondent's trial, the judge gave the following instruction to the jury:

> You are instructed that the defendant is **presumed to be not guilty** of the crime charged against her in the Information unless her guilt is established by evidence beyond a reasonable doubt and that **presumption of being not guilty** continues with the defendant unless every material allegation of the Information is proven by evidence beyond a reasonable doubt.

(Emphasis added). The court held that the trial judge erred in giving this instruction and reversed the respondent's conviction and remanded the case for a new trial pursuant to *Flores v. State*, 896 P.2d 558, *reh'g denied*, 899 P.2d 1162 (Okla. Crim. App.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 548 (1995).

In *Flores*, the court reversed the defendant's conviction and remanded the case for retrial because the "presumed not guilty" instruction deviated from an instruction required under Oklahoma statutory law. *Flores*, 896 P.2d 558, 560 (citing *Oklahoma Uniform Jury Instruction-Criminal-903* ("OUJI-CR-903") and 12 Okla. Stat. § 577.2). The fact that this holding is based on Oklahoma statutory law is demonstrated by the court's statement that, "[b]ecause OUJI-CR-903 correctly sets

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of the Supreme Court. The petitioner has completely failed to set forth any "federal" question which would compel this Court to review or grant its petition for certiorari.

forth the presumption of innocence and [Okla. Stat. tit. 12, § 577.2] requires trial courts to administer the uniform instructions, we find it was error to deviate from OUJI-CR-903." *Flores, supra,* 896 P.2d at 560.

Furthermore, the court stated that the test is "whether the error is harmless beyond a reasonable doubt or goes to the foundation of the case constituting a substantial violation of a constitutional **or statutory right**." *Id.* (emphasis added). A plethora of Oklahoma authority, including *Fontenot v. State,* 881 P.2d 69, 85, *reh'g denied,* (Okla. Crim. App. 1994); *Simpson v. State,* 876 P.2d 690, 693 (Okla. Crim. App. 1994); and Okla. Stat. tit. 20, § 3001.1, is cited in *Flores* as support for this proposition. *Id.* The court added, "[t]he presumption of innocence until proven guilty is a right guaranteed by statute," and referenced *Miller v. State,* 106 P. 538 (Okla. Crim. App. 1910) and § 836 of title 22 of the Oklahoma Statutes.[6] *Flores,* 896 P.2d at 560 n.3. The court concluded by stating "[w]e continue to adhere to the wisdom of our founding jurists and believe that [Okla. Stat. tit. 22, § 836] requires trial courts to instruct the jury on the presumption of innocence in every criminal case." *Id.* at 561; *see also Jenkins v. State,* 145 P. 500, 501 (Okla. 1914).[7]

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[6] Okla. Stat. tit. 22, § 836 provides:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

[7] The concurring opinion of Vice Presiding Judge Chapel, in the order denying rehearing in *Flores,* further demonstrates that the court relied on Oklahoma law. *See Flores v. State,* 899 P.2d 1162, 1164-65 (Okla. Crim. App. 1995) (Chapel, J.,

This Court has stated on several occasions that it will not review a state court decision which is based on adequate and independent state law grounds. *See, e.g., Sochor v. Florida*, 504 U.S. 527, 533, 112 S.Ct. 2114, 2119 (1992); *Illinois v. Rodriguez*, 497 U.S. 177, 182, 110 S.Ct. 2793, 2798 (1990); *Michigan v. Long*, 463 U.S. 1032, 1038-41, 103 S.Ct. 3469, 3475-78 (1983). This Court also lacks jurisdiction if the State court's opinion indicates that the State ground is an alternative holding. *Sochor*, 504 U.S. at 533, 112 S.Ct. at 2119; *Long*, 463 U.S. at 1041, 103 S.Ct. at 3478. In this case, the decision of the Oklahoma Court of Criminal Appeals is clearly based on State law and, therefore, 28 U.S.C. § 1257 does not confer jurisdiction on this Court.

III. IT IS WITHIN THE STATE COURT'S AUTHORITY TO REMEDY A DIRECT AND INTENTIONAL DISREGARD OF STATE LAW BY A DISTRICT COURT JUDGE.

The Oklahoma Court of Criminal Appeals intended to remedy the trial judge's *intentional* disobedience of state law. The trial judge has advertently administered the erroneous instruction in a number of cases, and it is within the authority of the Oklahoma Court of Criminal Appeals to remedy that misconduct. As Judge Chapel noted in his concurring opinion in *Flores*, "[t]he trial judge himself appreciates the radical difference between

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concurring) ("[a] majority of this Court finds the error in this case to be a substantial violation of a statutory right.").

the phrases 'presumed innocent' and 'presumed not guilty.' " *Flores*, 899 P.2d at 1166.[8]

The Oklahoma Court of Criminal Appeals has the authority and the duty to enforce Oklahoma law. Its decision has remedied a clear and intentional violation of state law by one trial judge in one county of the State. No federal interest exists in reviewing the Oklahoma Court of Criminal Appeals' decision. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955) (certiorari on cases which are either "academic or episodic" should be declined).

IV. JURISDICTION MAY NOT BE BASED UPON DUE PROCESS GROUNDS BECAUSE THE COURT OF CRIMINAL APPEALS DID NOT DECIDE ANY DUE PROCESS ISSUE.

In its third proposition, the petitioner argues that the Oklahoma Court of Criminal Appeals erred in finding that the trial judge's instruction, which stated that the prosecution has the burden of proving all the material allegations of the information beyond a reasonable doubt,

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[8] In making this statement, Judge Chapel referenced a comment which was made by the trial judge in another case (*Smith v. State*, Tulsa County District Court, CF-93-4510):

> Again as I have stated many, many times I do not give an instruction that is in the OUJI; to give a reason for not doing so, I believe that in the OUJI instruction, they state that the defendant is presumed to be innocent. There is a difference between being innocent and not guilty. A person can be found not guilty and still not be innocent of the crime charged.

Flores, 899 P.2d at 1166 (footnote omitted).

violated the Due Process Clause. This alleged proposition of error is not a proper basis for review of the decision of the Oklahoma Court of Criminal Appeals because the court did not decide the respondent's case on any due process ground.

Due process was not mentioned in the Accelerated Docket Order which reversed the judgment and sentence of the trial court. Furthermore, although the court in *Flores* reviewed the instruction requiring the prosecution to prove the material allegations of the information (as opposed to the elements of the crime), the court limited its holding to require that the uniform instructions be administered as mandated by state statute. *Flores*, 896 P.2d at 562-63. The petitioner argues that the Oklahoma Court of Criminal Appeals held "that *Sullivan v. Louisiana* [, ___ U.S. ___, 113 S.Ct. 2078 (1993)], mandated use of the phrase 'elements of the offense.' " (Petition, p. 12). However, the court made no such finding. The court simply stated that the instruction "may be confusing" and prescribed that it not be given in the future. *Flores*, 896 P.2d at 563.

Because the Court of Criminal Appeals did not decide this case, or *Flores*, on due process grounds, the petitioner's attempt to raise due process as a basis for this Court's review is meritless. This Court has repeatedly stated that it has no jurisdiction to review a state court decision unless a federal question has been "both raised and decided in the state court below." *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218, 103 S.Ct. 2317, 2321 (1983) (citing *Crowell v. Randell*, 35 U.S. 368 (1836)). Since no federal

question was raised or decided below, a review of the petition for certiorari is improper.

CONCLUSION

The lower Court's decision is expressly based upon adequate and independent state law grounds. There is no valid statutory basis upon which this Court may exercise jurisdiction. The statutory basis cited by the State applies to federal courts of appeals, and the factual and legal circumstances of this case do not meet the standards applicable to a petition arising from a decision of a state court of last resort.

Two (2) months ago this Court considered, and rejected, issues which the State of Oklahoma has conceded in its petition are identical to those which are here being raised again. No factual or legal distinction between the petition for writ of certiorari in *Flores*, which was denied, and the petition here has been identified. The State's petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A – STATUTES INVOLVED

28 U.S.C. § 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1257 provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Okla. Stat. tit. 12, § 577.2 provides:

> Whenever Oklahoma Uniform Jury Instructions (OUJI) contains an instruction applicable in a civil or a criminal case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the OUJI instructions shall be used unless the court determines that it does not accurately state the law.

Okla. Stat. tit. 20, § 3001.1 provides:

> No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

Okla. Stat. tit. 22, § 836 provides:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted.

Oklahoma Uniform Jury Instruction – Criminal, No. 109 provides:

> The defendant(s) [has] [have] pled not guilty. A plea of not guilty puts in issue each element of the crime with which the defendant(s) [is] [are] charged. A plea of not guilty requires the State to prove each element of the crime beyond a reasonable doubt.

Oklahoma Uniform Jury Instruction – Criminal, No. 903 provides:

> The defendant(s) [is] [are] presumed innocent of the crime(s), and the presumption continues unless after consideration of all the evidence you are convinced of [his] [her] guilt beyond a reasonable doubt. The State has the burden of presenting the evidence that establishes guilt beyond a reasonable doubt. The defendant(s) must be found guilty unless the State produces evidence which convinces you beyond a reasonable doubt of each element of the crime(s).